No. 92-595

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In The

Supreme Court of the United States

October Term, 1992

ROY W. and KATHLEEN ROBINSON, individually and as partners d/b/a COMPUTER SLIDE COMPANY, and that class of persons and entities similarly situated,

Cross-Petitioners,

v.

THE CITY OF SEATTLE, WILLIAM JUSTEN and JANE DOE JUSTEN, BEATRICE RYAN and JOHN DOE RYAN, HOLLY MILLER and JOHN GAYMAN, and OVID THOMPSON,

Cross-Respondents.

SINTRA, INC., KEITH H. HAMACK and PATTY L. HAMACK, ARTHUR M. STANLEY and SUSAN S. STANLEY,

Cross-Petitioners,

v.

THE CITY OF SEATTLE, HOLLY MILLER and JOHN GAYMAN, OVID THOMPSON, DAVID MOSELEY and JANE DOE MOSELEY, BEATRICE RYAN and JOHN DOE RYAN,

Cross-Respondents.

Cross-Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Where a city ordinance requires a property owner to pay a fee to a low-income housing fund as a condition to issuance of a development permit, and the court holds that the city's low-income housing problem is not caused by the property owner but is a result of social forces within the city as a whole, and the court further finds the ordinance constitutes an unfair shifting of public burdens onto the individual landowner, can the city nevertheless be insulated from an unconstitutional exaction/takings claim by showing that some remaining economic use is available for the property?

(2) Where a dilapidated, near vacant hotel is purchased for $670,000 and the owner proposes to convert the property into productive use as a mini-storage warehouse but is precluded from doing so unless a $218,000 development fee is paid to the city for a low-income housing fund, has the property owner suffered a taking without compensation in violation of *Nollan v. California Coastal Commission*?

(3) Where a city ordinance is held to be unduly oppressive and violates substantive due process, and the court therefore invalidates the ordinance, is the affected property owner entitled to damages against the city under 42 U.S.C. 1983?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED 3

STATEMENT 4

A. Statement of Facts 5

B. Proceedings Below 6

REASONS FOR GRANTING CROSS-PETITION 7

A. The Washington Supreme Court Takings Test for Land Use Regulation Conflicts With This Court's Precedents 7

B. Washington Supreme Court's Holding That a City and Its Employees are Not Liable for Damages Under 42 U.S.C. § 1983 for Enforcement of an Ordinance Which Deprives an Owner of His Property Without Due Process Conflicts With Federal Law 9

C. A Review of Recent Washington Supreme Decisions, Culminating in the Cases Now at Bar, Illustrate a Substantial Conflict With Federal Takings Law and a Disregard for the Remedy Under 42 U.S.C. § 1983 Which Merit Review by This Court 10

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Agins v. Tiburon, 447 U.S. 255 (1980) 7

Armstrong v. United States, 364 U.S. 40, 49 (1960) 7

Carey v. Piphus, 435 U.S. 247 (1978) 9

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987) 12, 13

Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962) 9

Gomez v. Toledo, 446 U.S. 635, 640 (1980) 9

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 5

Lawton v. Steele, 152 U.S. 133 (1894) 9

Lucas v. South Carolina Coastal Council, 120 L. Ed. 2d 798, 818-822, 112 S. Ct. 2886 (1992) 10, 14

Monroe v. Pape, 365 U.S. 167 (1961) 9

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 7, 8, 13, 14

Orion Corporation v. State of Washington, 109 Wn.2d 621, 747 P.2d 1062 (1987) 10, 11

Owen v. Independence, 445 U.S. 622 (1980) 9

Pennell v. San Jose, 45 U.S. 1 (1988) 7

Presbytery of Seattle v. King County, 114 Wn.2d 320, 787 P.2d 907 (1990) 10, 11, 12, 13

Robinson v. Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992) 1, 5, 8, 13

Sintra v. Seattle, 119 Wn.2d 1, 829 P.2d 765 (1992) 1, 7, 8, 13

Yee v. City of Escondido, 503 U.S. ___, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992) 8

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION, STATUTES, AND ORDINANCES

U.S. Constitution Amend. V 3, 4

U.S. Constitution Amend. XIV 3, 4

28 U.S.C. § 1257(a) (1988)..... 2

42 U.S.C. § 1983 (1988) ..... *passim*

Seattle Municipal Code Ch. 22.210 3

Seattle Ordinance No. 109220 3

Seattle Ordinance No. 112342 3

COURT RULES

Supreme Court Rule 12.3 .....1, 2

OTHER AUTHORITIES

Comment, *Taking Issue With Takings: Has the Washington Supreme Court Gone Too Far?*, 66 Wash. L. Rev. 545 (1991).....10

No. 92-487

In The

Supreme Court of the United States

October Term, 1992

THE CITY OF SEATTLE, WILLIAM JUSTEN and JANE DOE JUSTEN, BEATRICE RYAN and JOHN DOE RYAN, HOLLY MILLER and JOHN GAYMAN, and OVID THOMPSON,

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v.

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THE CITY OF SEATTLE HOLLY MILLER and JOHN GAYMAN, OVID THOMPSON, DAVID MOSELEY and JANE DOE MOSELEY, BEATRICE RYAN and JOHN DOE RYAN,

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Cross-Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Washington

CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-petitioners respectfully petition for a writ of certiorari to review the judgments of the Supreme Court of the State of Washington in these cases.

OPINIONS BELOW

Robinson. The decision of the Washington Supreme Court is reported at 119 Wn.2d 34, 830 P.2d 318 (1992) and is reproduced in the appendix of petitioner at 1a-50a.

Sintra. The decision of the Washington Supreme Court in *Sintra* is reported at 119 Wn.2d 1, 829 P.2d 765 (1992), and is reproduced in the appendix of petitioner at 69a-96a.

JURISDICTION

The decisions of the Washington Supreme Court in both *Robinson* and *Sintra* were entered on May 14, 1992. Petitioners' motions for reconsideration in each case were denied on June 17, 1992 and June 18, 1992 respectively. This Court has jurisdiction under 28 U.S.C. 1257(a) (1988). A petition for writ of certiorari was received by cross-petitioners on September 16, 1992 and this cross-petition is timely filed pursuant to Supreme Court Rule 12.3.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall . . . deprive any person of life, liberty or property, without due process of law . . .

The Fifth Amendment to the United States Constitution provides in pertinent part:

> . . . nor shall private property be taken for public use, without just compensation.

42 U.S.C. § 1983 (1988) provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state . . . State . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .

The first Seattle Housing Preservation Ordinance ("HPO I"), Ordinance 109220 (1980), formerly codified at Seattle Municipal Code ("SMC") Chapter 22.210, is reproduced in petitioners' appendix 136a-147a. HPO-I was repealed and replaced by the second Housing Preservation Ordinance ("HPO II"), Ordinance 112342 (1985), also codified as SMC Chapter 22.210 and reproduced in petitioners' appendix 116a-135a.

STATEMENT

In both cases the Washington Supreme Court reversed summary judgments dismissing damage claims against petitioners, the City of Seattle and certain of its employees, under 42 U.S.C. § 1983. The court:

(1) ruled in both cases that Seattle's Housing Preservation Ordinance facially violated Fourteenth Amendment due process standards because it oppressively required property owners to pay a monetary exaction to the city to be expended to provide low-income housing although the court found that homelessness, or an alleged shortage of low income housing, was the result of complex social causes, not the conduct of these property owners;

(2) ruled in both cases that property owners were not entitled to money damages under 42 U.S.C. § 1983 for the aforementioned due process violation;

(3) ruled in both cases that continued enforcement of Seattle's Housing Preservation Ordinance after it had been declared facially invalid by the state court deprived the owners of their property without due process;

(4) ruled that the owner's property was not "taken" without just compensation contrary to the Fifth Amendment where the abstract purpose of the ordinance was conceivably within the state's police power even though the exaction was not imposed to cure a problem allegedly caused by the specific developments at issue;

(5) ruled that alleged subjective reliance upon advice from a City Attorney is insufficient to establish that City employees were entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

A. Statement of Facts

HPO I and HPO II required private owners of multi-family residential buildings to pay a license fee to the City of Seattle and tenant relocation assistance payments (TRAP) directly to low-income tenants as conditions precedent to demolition or change to a nonresidential use.

Under the license fee provision of HPO II, for example, *Sintra* was required to pay the City a $219,000 license fee to convert the use of its abandoned building to a mini-warehouse whereas the entire purchase price of the building was only $670,000. Sintra could not afford to pay the exaction and hence was denied the permit despite the fact that this feature of HPO I had been declared facially invalid in 1983 and the comparable provision of HPO II was similarly declared invalid by the state court in the summer of 1986.

Robinson involved claims by that class of persons against whom the HPO was enforced who actually paid either the license fee or TRAP payments directly to low-income tenants (and only low-income tenants) who were or would be dislocated by the change of use or demolition.

As was the case with the license fee, the City continued to enforce the TRAP provision after it was declared

facially unconstitutional in December 1988 when its enforcement was enjoined. Ultimately contempt of court citations were issued against the City of Seattle and City employees Miller and Thompson, who were directly responsible for continued enforcement in spite of the permanent injunction.

B. Proceedings Below.

Having properly plead and substantively supported § 1983 claims for deprivation of property without due process and taking property without just compensation the trial court in both cases dismissed all federal claims against all defendants on summary judgment.

Accepting direct review the Washington Supreme Court held that the license fee provisions of the ordinance deprived the owners of property without due process finding same unduly oppressive however refused to grant the owners relief under 42 U.S.C. § 1983 for money damages except insofar as it was demonstrated that the City and individual enforcement officers knowingly continued enforcement of the invalid ordinances after trial court decrees of invalidity.

Further, the Washington Supreme Court in both instances found there was no taking without just compensation even though the ordinances imposed a land use exaction to address a problem of general social origin not arising from the proposed development of the subject properties.

REASONS FOR GRANTING CROSS-PETITION

A. The Washington Supreme Court Takings Test for Land Use Regulation Conflicts With This Court's Precedents.

Despite concluding that the exactions at issue are not imposed to cure a specific problem arising from the subject development but rather constitute a blatant attempt to shift the social cost of homelessness to a discrete segment of property owners the Washington court nonetheless concluded that the exaction would not effect a taking because it "substantially advance[s] legitimate state interests." See *Agins v. Tiburon*, 447 U.S. 255 (1980); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). See also *Pennell v. San Jose*, 45 U.S. 1 (1988).

In so holding the state court denied the taking remedy in a situation where the court itself acknowledged that government forced some people alone to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Further, the court emasculated this court's holding in *Nollan* that a taking occurs where there is no nexus between the consequences of the development sought to be permitted and the condition sought to be imposed, even if that condition might serve some other, but unrelated, legitimate purpose. *Nollan*, 483 U.S. at 836-837.

Rather the Washington Supreme Court twists the *Nollan* test beyond recognition. In n. 7 of *Sintra*, the court stated that *Nollan's* exaction analysis only applies where a physical invasion is involved. *Sintra*, 829 P.2d at 773, n. 7. The principles of *Nollan*, however, are not limited to cases

where the subject matter of the exaction involves a physical invasion of property. The recent decision in *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153, 112 S. Ct. 1522 (1992), explains.

In *Yee*, the property owners unsuccessfully attempted to characterize a rent control provision as working a physical invasion taking. *Yee*, 118 L. Ed. 2d, Id. 164-65. This court explained that the ordinance should have been analyzed as a potential regulatory taking. Id. at 165. Citing *Nollan*, this court suggested that petitioner's theory may cause "a *regulatory* taking" by analyzing "whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance." Id. at 167. However, this inquiry "has nothing to do with whether the ordinance causes a *physical* taking." Id. Moreover, the exaction analysis under the substantial advancement test "does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property." Id. at 169. But the state court in *Sintra* and *Robinson* focuses only on the economic uses available and would allow a taking only if the HPO exaction can be shown to result in a denial of all economic use.

In short, there is nothing left of *Nollan* in the State of Washington after *Sintra* and *Robinson*.

B. Washington Supreme Court's Holding That a City and Its Employees are Not Liable for Damages Under 42 U.S.C. § 1983 for Enforcement of an Ordinance Which Deprives an Owner of His Property Without Due Process Conflicts With Federal Law.

While both cases hold the subject ordinance deprives owners of their property without due process because it is an overly oppressive shifting of public burdens to private shoulders contrary to *Lawton v. Steele*, 152 U.S. 133 (1894) (recently reaffirmed in *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962) the court nevertheless limited the available remedy to simple invalidation of the ordinance foreclosing any opportunity for an award of money damages pursuant to 42 U.S.C. § 1983.

However the distinction finds no place in the language of 42 U.S.C. § 1983 nor the decisions of this Court which plainly hold that any deprivation of a federal constitutional right under color of state law entitles the citizen to all remedies provided by § 1983. See e.g. *Monroe v. Pape*, 365 U.S. 167 (1961); *Carey v. Piphus*, 435 U.S. 247 (1978); *Owen v. Independence*, 445 U.S. 622 (1980); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The remedy under § 1983 follows a deprivation of property without due process of law as night follows day – except in the State of Washington.

C. A Review of Recent Washington Supreme Court Decisions, Culminating in the Cases Now at Bar, Illustrate a Substantial Conflict With Federal Takings Law and a Disregard for the Remedy Under 42 U.S.C. § 1983 Which Merit Review by This Court.

To its credit, the Washington Supreme Court has attempted to provide a definite analytical framework for determining a regulatory taking. However, the court's struggle has produced an approach to takings law which is in sharp conflict with this court's precedents on the subject. Moreover, the impact has been a severe reduction in constitutional protection for property owners in Washington. See Comment, *Taking Issue With Takings: Has the Washington Supreme Court Gone Too Far?*, 66 Wash. L. Rev. 545 (1991). Intervention by this Court is now necessary to bring Washington back in alignment with federal precedent.

Washington's departure from federal precedent begins primarily with the 1987 decision in *Orion Corporation v. State of Washington*, 109 Wn.2d 621, 747 P.2d 1062 (1987). The state supreme court ruled that land use restrictions intended to safeguard the public interest in "health, the environment or the fiscal integrity of the area" are insulated from takings claims "even if the regulation denies a landowner all economically viable use of the property." *Orion*, 109 Wn.2d at 654. This broad insulation for regulatory actions is in direct conflict with this Court's opinion in *Lucas v. South Carolina Coastal Council*. 120 L. Ed. 2d 798, 818-822.

Three years after *Orion*, the Washington court issued its opinion in *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907 (1990). Although ripeness considerations precluded the court from addressing the merits

of the taking issue, the court nevertheless in dicta set out to refine its insulation doctrine of *Orion* by establishing a new approach to analyzing regulatory takings in Washington. Under *Presbytery*, a court must first apply a unique "threshold inquiry" to determine whether the regulation is to be reviewed under a takings analysis or a due process analysis. The court explained that distinguishing between takings and due process is "critical" because the remedy for a taking is compensation whereas the remedy for a due process violation is mere invalidation of the regulation. The threshold inquiry states:

> To determine which of these two constitutional tests to utilize, the threshold inquiry a court must make is whether the challenged regulation safeguards the public interest in health, safety, the environment or the fiscal integrity of an area. A regulation which does that is to be contrasted with one that goes beyond preventing a public harm and actually enhances a publicly owned right in property. Secondly, the court should ask whether the regulation destroys one or more of the fundamental attributes of ownership – the right to possess, to exclude others, and to dispose of property. If a regulation does not infringe upon a fundamental attribute of ownership, and if it protects the public form one of the foregoing listed harms, then no constitutional 'taking' requiring just compensation exists.

Presbytery, 767 P.2d at 912.

In devising this threshold inquiry, the Washington court admitted its concern that the prospect of paying just compensation for regulatory takings may intimidate

legislative bodies from adopting certain land use regulations. Id. at 913, n. 201. Accordingly, the court explained the effect of the inquiry would be to diminish potential takings claims and redirect those claims into due process challenges. "[M]any challenges to land use regulations will most appropriately be analyzed under a due process formula rather than a 'taking' formula." Id. at 914. "Invalidation of the ordinance (instead of compensation) also avoids intimidating the legislative body." Id. at 913.

It should be noted that similar concerns did not dissuade this Court from enforcing the compensation remedy. This Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 317, 96 L. Ed. 2d 250, 107 S. Ct. 2378 (1987), was "not unmindful" of the "inhibiting financial force" of the compensation remedy upon the "degree of freedom of the land-use planning function." However, such considerations "must be evaluated in light of the command or the Just Compensation Clause." Id. This Court explained that government may always "elect to abandon its intrusion or discontinue regulations" which are found to effect a taking and thus limit damages to a temporary taking. Id.

Aside from charting new waters in federal takings law in a manner inconsistent with this Court's precedent, the state court's effort to avoid compensation had a major loophole. The omission in the Washington court's new approach was the failure to recognize that invalidation is not the only remedy for a due process violation. A landowner may still receive damages for a due process violation through 42 U.S.C. § 1983.

The next relevant cases to be decided by the state court were *Robinson* and *Sintra*, the cases now at bar. These cases reaffirm the threshold inquiry approach. In *Robinson* the takings claim was denied because it could not be shown that the HPO facially deprived all economic use of all affected properties. In *Sintra* the court remanded for a determination of the remaining economic use afforded *Sintra* under the HPO. However, the key error in the court's takings analysis was ruling that the principles of *Nollan* do not apply to the exaction of cash under the HPO. The court incorrectly viewed *Nollan* as a physical invasion case and therefore did not apply *Nollan's* principles for reviewing the constitutionality of development conditions/exactions.

In addition, the court addressed due process contentions raised by the plaintiffs. On this claim the court ruled that the HPO violated substantive due process because the ordinance was unduly oppressive since it was an attempt to shift public burdens onto a discrete segment of the community. Nevertheless, the court continued to maintain the position in *Presbytery* that the only remedy for a due process violation was invalidation of the ordinance. The court erred in not allowing damages to the effected property owners under § 1983. The state court would allow damages only for a potential separate due process violation which arose by the continued enforcement of the HPO ordinance after it had been ruled illegal by a state court.

This chronology demonstrates two main themes. First, the state cases have pursued an approach to the regulatory takings analysis that attempts to avoid the compensation requirement upheld by this court in *First*

Church. In order to achieve this objective, the state has established an analytical approach that is inconsistent with this Court's opinions in *Lucas* and *Nollan* and which works to deprive property owners of constitutional rights they would enjoy in other states.

Second, the state court has redefined constitutional challenges of land use regulations into substantive due process claims where the constitutional remedy is invalidation of the regulation. However, in order to limit the remedy available to property owners, the court has also ignored and denied damages which are provided by 42 U.S.C. § 1983.

If the protections afforded by the federal constitution and statutes are to mean anything in Washington, this court should grant the Cross-Petition for Writ of Certiorari.

CONCLUSION

The cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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